

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Amendment of the Television Table of)	
Allotments to Delete Noncommercial)	MB Docket No. 04-312
Reservation of Channel *39, 620-626 MHz,)	RM No. 11049
Phoenix, Arizona, and to Add Noncommercial)	
Reservation on Channel 11, 198-204 MHz,)	
Holbrook, Arizona)	

To: Commission's Secretary, Office of the Secretary
Attn: Chief, Video Division, Media Bureau

**REPLY COMMENTS OF
UNIVISION COMMUNICATIONS INC.**

Scott R. Flick
Brendan Holland

Its Attorneys

SHAW PITTMAN LLP
2300 N Street, NW
Washington, D.C. 20037
(202) 663-8000

Dated: December 14, 2004

Summary

It is no coincidence that the only substantive comments filed in support of the proposed swap of noncommercial reserved Channel 39 at Phoenix, Arizona with commercial Channel 11 at Holbrook, Arizona were filed by the two parties to the proposed swap. Indeed, as discussed in these Reply Comments, those entities are the only parties who stand to benefit from the swap. Undaunted by Commission precedent, lack of public interest benefits, and the prospect of eliminating one of only two noncommercial reserved channels in Phoenix, the *Joint Comments* filed by NBC Telemundo License Co. and Community Television Educators, Inc. (“CTE”) struggle mightily to argue that the entire body of Commission precedent on noncommercial channel swaps is either wrong or should not be applied in this case. In the end, however, this effort falls far short; unable to present any conceivable circumstance in which the public would benefit from the proposed swap, and unable to explain how the removal of an operating noncommercial service from 3,217,769 Phoenix-area residents would not be devastating to the public interest.

Despite the existence of eight Phoenix broadcast facilities carrying Spanish-language programming, and despite the fact that NBC Telemundo’s Phoenix station KDRX-CA has City Grade, Grade A, and Grade B coverage equivalent to the full power stations in the market, as well as universal cable carriage, NBC Telemundo claims that the proposed swap is necessary in order to improve reception to the small number of viewers who are currently unable to receive KDRX-CA’s programming. However, even utilizing the data submitted by NBC Telemundo and CTE, the total number of viewers that will actually benefit from the slight improvement over KDRX-CA’s current signal is only **0.1%** of the number of Phoenix viewers that will lose access to half of their noncommercial signals.

Since the Phoenix area is already well-served by both Spanish and English-language broadcast stations that compete vigorously, the swap's goal of adding a twelfth full power commercial station, which would result in a marginal improvement in the signal of one of eight local Spanish-language broadcast stations, hardly outweighs the harm of removing half of the noncommercial reserved channels in Phoenix. Indeed, the Commission has previously ruled that Spanish-speaking residents of Phoenix already have abundant local program options, further marginalizing any claimed benefit from the swap. Whether judged from the lack of public benefit it will create, or from the immense harm to the public it will cause, the conclusion that the proposed swap is harmful to the public interest is unavoidable, and the swap should be rejected.

Table of Contents

Summary	i
Table of Contents	iii
I. The <i>Joint Comments</i> Are Internally Inconsistent, Which Ultimately Undermines the Very Points They Struggle to Make.....	3
II. The <i>Joint Comments</i> Concede That This Proceeding Is Not About a Channel Swap Within a Local Market, But About Terminating Noncommercial Service to Over Three Million Viewers in Phoenix.....	7
III. The Proposed Swap Is Contrary to the Public Interest and the <i>Joint Comments</i> Provide No Basis for Eliminating a Noncommercial Service in Phoenix	10
A. NBC Telemundo Is Already Equipped to Compete Effectively in the Phoenix Market and Has Failed to Demonstrate How Depriving Phoenix Viewers of a Noncommercial Service Will Improve Its Competitive Position	11
B. Even If the <i>Joint Comments</i> ’ Argument That Terminating Noncommercial Service to Over Three Million People Can Be Justified by a Claimed Improvement in Commercial Broadcast Service, the Number of Commercial Broadcast “Beneficiaries” Is Miniscule	15
C. The <i>Joint Comments</i> ’ Premise That Television Markets Are Divided Into English-Language Markets and Spanish-Language Markets Is Erroneous and Contrary to Commission Precedent	17
D. Phoenix Residents Are Well-Served by Both Full and Low Power Stations Carrying Spanish and English-Language Programming.....	20
E. While NBC Telemundo Threatens to Terminate Broadcast Service in Holbrook and Thereby Create a “White Area” If the Commission Rejects the Proposed Swap, the <i>Joint Comments</i> Themselves Demonstrate That Holbrook Cannot Support a Noncommercial Station and the Proposed Swap Would Therefore Create the Very “White Area” That the Swap Is Supposed to Prevent	24
F. Having Bought a Station with No Revenue, NBC Telemundo Now Threatens the Commission With the Creation of a White Area in Holbrook If Its Demands for a Full Power Station in Phoenix Are Not Met	27
G. Beyond the Lack of a Public Interest Basis for the Swap, the Proposed Parties to the Swap Have Failed to Meet the Procedural Requirements for a Channel Swap ...	28
IV. In the Event That the Commission Decides to Approve the Channel Swap Proposal, Channel 39 at Phoenix Must Be Opened to Competing Applicants	30
CONCLUSION	32

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Amendment of the Television Table of)	
Allotments to Delete Noncommercial)	MB Docket No. 04-312
Reservation of Channel *39, 620-626 MHz,)	RM No. 11049
Phoenix, Arizona, and to Add Noncommercial)	
Reservation on Channel 11, 198-204 MHz,)	
Holbrook, Arizona)	

To: Commission's Secretary, Office of the Secretary
Attn: Chief, Video Division, Media Bureau

**REPLY COMMENTS OF
UNIVISION COMMUNICATIONS INC.**

Univision Communications Inc. ("Univision"), by its counsel, hereby submits its Reply Comments in the above-captioned proceeding.¹ Based upon a review of the Commission's files, it appears that the only substantive comments filed in support of the proposed channel swap is the joint filing (the "*Joint Comments*") by NBC Telemundo License Co. ("NBC Telemundo") and Community Television Educators, Inc. ("CTE"), the proposed parties to the swap.² As would be expected, these *Joint Comments* laboriously struggle to demonstrate that the entire body of Commission precedent on noncommercial channel swaps is either wrong or should not be applied in this case. At the end of the day, however, there is nothing unique about this case,

¹ *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel *39, 620-626 MHz, Phoenix, Arizona*, Memorandum Opinion and Order and Notice of Proposed Rule Making, 19 FCC Rcd 14930 (Aug. 6, 2004) ("*NPRM*").

² *Joint Comments of NBC Telemundo License Co. and Community Television Educators, Inc.*, MB Docket No. 04-312 (Nov. 30, 2004) ("*Joint Comments*").

and all of the reasons that the Commission has cited over the years for rejecting such swaps apply with full force here. Removing from Phoenix half of its operating noncommercial allotments is certainly not in the public interest, and NBC Telemundo's efforts to force such a result by explicitly threatening to shut down its Holbrook station if the swap is not granted hardly helps its case.

Whether the Holbrook station dies quickly by a twist of NBC Telemundo's stiletto without the swap, or slowly starves to death as a noncommercial station in a sparsely populated area with the swap, the harm to the residents of Holbrook is the same. Approving the swap would only compound the harm by removing a noncommercial station from Phoenix residents as well. There is no public interest basis for such a result, nor is there any reason to harm noncommercial service to over three million people based on a questionable claim of improved service to a tiny subset of the entire Phoenix community (*i.e.*, Hispanics in Phoenix who are Spanish-language dominant, *and* who do not subscribe to cable or satellite service, *and* who live outside the expansive signal contour of Telemundo station KDRX-CA, *and* who rely solely on indoor antennas, *and* whose indoor antennas actually receive CTE's full power noncommercial station but do not receive KDRX-CA).

Moreover, the *Joint Comments'* skewed perspective that any harm to the residents of Phoenix is justified, since converting a noncommercial station to a commercial station will create a more competitive market, is fundamentally flawed. First, the Commission could toy with the level of competition in *any* market by converting local noncommercial stations into commercial stations, but has, *without a single exception*, emphatically refused to do so, recognizing the unique benefits that noncommercial stations convey to their communities. Second, even without the full power station it seeks, NBC Telemundo is already equipped to compete quite effectively

in Phoenix, which is well-served by both Spanish and English-language stations that compete vigorously. Accordingly, the proposed channel swap should be rejected.

I. THE *JOINT COMMENTS* ARE INTERNALLY INCONSISTENT, WHICH ULTIMATELY UNDERMINES THE VERY POINTS THEY STRUGGLE TO MAKE

At their core, the *Joint Comments* rest on the fundamental contradiction that while one full power noncommercial station to serve all the citizens of Phoenix is plenty, one full power Spanish-language station (along with seven Class A and low power Spanish-language stations) to serve the citizens of Phoenix is woefully inadequate – so much so that radical governmental intervention is required. More precisely, NBC Telemundo would have the Commission deprive *all* Phoenix viewers of one of only two stations operating on a noncommercial channel based upon its assertion that a *subset* of Hispanic viewers in Phoenix – those that are Spanish-dominant, rely exclusively on over-the-air signals, and have poor antennas – *might* receive only one full power Spanish-language station and not the many other local Spanish-language stations. The threshold contention in the *Joint Comments* that a subset of Hispanic viewers is underserved because it receives only one full power Spanish language station over-the-air, but that the entire community of Phoenix will still be well-served if it is reduced to only one full power noncommercial station, is nonsensical and makes any further analysis of the proposed swap unnecessary.

Similarly, the *Joint Comments* argue that moving noncommercial station KDTP to Holbrook will not result in the loss of the station, as it will still technically be part of the Phoenix DMA. Thus, the argument goes, the fact that Holbrook is 228 miles away and the station's signal does not reach anywhere near Phoenix should not diminish the fact that the noncommercial station would still be considered part of the Phoenix market, and the Phoenix DMA will have two stations operating on noncommercial allotments both before and after this

swap.³ That same logic, however, would also apply to the number of full power Spanish-language stations in the market. The Phoenix DMA already has three full power television stations carrying Spanish-language programming in the market: KPHZ(TV), Holbrook; KTVW(TV), Phoenix; and KFPH(TV), Flagstaff. Thus, while the *Joint Comments* argue that two noncommercial stations in the DMA is sufficient, regardless of where they are located, it simultaneously seeks to convince the Commission that three full power Spanish-language stations in that same DMA is insufficient because only one is licensed to Phoenix. The logic of the *Joint Comments* must work both ways: if the Holbrook station is insufficient to serve Spanish-language viewing needs in the market, then it must also be insufficient to serve the noncommercial needs of the market. Conversely, if two noncommercial stations spread across the DMA is adequate, then three Spanish-language stations in the DMA are more than enough.

The specious logic continues in the *Joint Comments*' discussion of low power television stations. The *Joint Comments* claim that if the Commission views Class A and low power stations that carry Spanish-language programming as "functionally equivalent" to full power stations, then it must also view noncommercial low power stations as equivalent to full power stations, and therefore conclude that "no harm" would result from the proposed swap since CTE can rebroadcast its noncommercial programming in Phoenix on KDRX-CA.⁴ However, if the Commission accepts the premise that Class A and low power stations are functionally equivalent to full power stations, then there is no reason to do the swap at all, since NBC Telemundo is

³ *Joint Comments* at n.32.

⁴ *Joint Comments* at 43. Of course, this argument overlooks the fact that KDRX-CA is unlikely to retain its cable carriage in Phoenix if it ceases to carry Telemundo programming in favor of noncommercial programming from a distant town. See *Univision Comments* at n.44. It also overlooks the fact that there is no regulatory restriction that would prevent CTE from operating KDRX-CA as a commercial station or selling it to someone else that is looking for a commercial Class A station in Phoenix.

already rebroadcasting its Spanish-language programming in Phoenix on KDRX-CA now!

Conversely, if as is claimed elsewhere in the *Joint Comments*,⁵ Class A and low power stations are *not* functionally equivalent to full power stations, then Phoenix residents will be harmed by losing half of their noncommercial stations to the swap. Under the first premise, there is no benefit to the swap, and under the second premise, there is much harm from it. In either case, there is no public interest basis for the proposed swap.⁶

Finally, the Commission should be cautious about accepting at face value even the factual statements made in the *Joint Comments* and its attachments. For example, much is made over the results of a telephone survey of “500 Phoenix-area adults”⁷ providing an opinion on their ability to receive Telemundo station KDRX-CA. However, a review of the questionnaire and the “Background/Methodology” page of the survey, both of which are attached to the *Joint Comments* as Exhibit 1, reveals that while 500 telephone calls were placed, those respondents who indicated that they were not Hispanic, or who indicated that they were Hispanic but whose families spoke English more often than Spanish at home were rejected and asked no further questions.⁸ Given that the *Joint Comments* themselves state that 34.1% of Phoenix residents are Hispanic (with the rest of the DMA being far lower), and that only 45.4% of Phoenix Hispanic

⁵ *Joint Comments* at 40-43.

⁶ Stated starkly, the *Joint Comments* simultaneously argue that a low power television station airing Telemundo programming is not the equivalent of a full power station airing Telemundo programming, but that a low power station carrying CTE’s noncommercial programming is a fully equivalent substitute for a full power station.

⁷ *Joint Comments* at 37.

⁸ See *Joint Comments*, Exhibit 1, Appendix 1, Questionnaire at 1. This fact is misstated on the first page of Exhibit 2 of the *Joint Comments*, which states that “[t]he sample consisted of 500 Phoenix-area adults of Hispanic descent who live in households where Spanish is spoken at least half the time,” as well as in Footnote 8 of the *Joint Comments*, which states “[i]n the recent professional telephone survey of 500 Hispanic viewers in Phoenix commissioned by NBC Telemundo”

households are Spanish-dominant,⁹ that would mean that, at most, 15% of those called were actually asked questions about their television reception. In other words, the results of this 500 person survey are actually based on the responses of only 75 or so individuals.¹⁰

Moving beyond the population sample, the survey appears to have methodological and other errors as well. For example, the *Joint Comments* make much of the survey chart titled “Reasons for Not Watching Channel 48 More Often,”¹¹ which indicates that 42% of respondents do not watch KDRX-CA more often because of reception problems.¹² However, the survey fails to ask respondents why they do not watch KTVW more often, apparently assuming that KTVW’s over-the-air reception is 100%, despite the similarity of the two stations’ signal contours. To the extent that NBC Telemundo claims a competitive disadvantage because KDRX-CA’s signal is inferior to KTVW’s signal, asking solely about a respondents’ ability to receive KDRX-CA but not about the respondent’s ability to receive KTVW proves nothing about the technical ability of KDRX-CA to compete against KTVW.

Of course, one has to question the fundamental validity of the survey itself, given that 14% of Spanish-dominant *cable/satellite* respondents also cited “Weak/no signal; reception problems” as the reason for not watching KDRX-CA. A further flaw in the survey results is revealed in the legend to this chart, which indicates that the percentages given in the chart

⁹ See *Joint Comments* at 3.

¹⁰ Of course, to the extent that NBC Telemundo or CTE might claim that the number of Spanish-dominant respondents was actually much higher than 75, that would merely indicate that the telephone survey failed to utilize a random sample representative of the general Phoenix population, bringing the results even further into question.

¹¹ *Joint Comments* at Exhibit 1.

¹² *Joint Comments* at 38.

represent only those respondents who say they “seldom” or “never” watch KDRX-CA.¹³ As a result, *the survey chart reveals absolutely nothing about the total percentage of Spanish-dominant households that are unable to receive KDRX-CA*. Instead, it reveals only that, of those who do decline to watch KDRX-CA, no matter how small that number of viewers is, significantly less than half of them cite reception as the reason (compared to the over half of respondents who cited either a lack of time or a disinterest in KDRX-CA’s programming).¹⁴

While this and other errors in the survey results that are discussed herein are obvious on their face, there is no way of knowing how many other mistakes are contained in the results that are not so obvious. What is obvious, however, is that both the logic and facts presented in the *Joint Comments* are internally inconsistent, and certainly provide no basis for the tremendous deviation from existing law and policy that the proponents of this channel swap seek.

II. THE JOINT COMMENTS CONCEDE THAT THIS PROCEEDING IS NOT ABOUT A CHANNEL SWAP WITHIN A LOCAL MARKET, BUT ABOUT TERMINATING NONCOMMERCIAL SERVICE TO OVER THREE MILLION VIEWERS IN PHOENIX

As discussed in Univision’s Comments, the very premise of commercial/noncommercial channel swaps is to permit a noncommercial station to improve service to its local viewers without harming those viewers’ overall broadcast service.¹⁵ It is for this reason that Section 1.420(h) of the Commission’s Rules requires that the commercial and noncommercial stations involved serve “substantially the same market,” which Commission precedent defines as serving

¹³ This result is misstated in the *Joint Comments* as being from “[a]mong respondents who rely on over-the-air signals and who reported watching Univision’s full-power Channel 33 *more often* than Telemundo’s low-power Channel 48” *Joint Comments* at 38 (emphasis added).

¹⁴ *Joint Comments* at Exhibit 1.

¹⁵ *Univision Comments* at 6-8.

substantially the same geographic area.¹⁶ This limitation on channel swaps ensures local viewers will not lose access to either station, but will merely view each of them on a different channel than before. That is of course impossible with the proposed swap, where the stations are separated by vast distances.

While the *Joint Comments*, on their face, urge the Commission to proceed with the swap as though the two stations did serve substantially the same area, a principal argument in the *Joint Comments* – that the Commission has already decided to eliminate vacant noncommercial allotments in Arizona, so eliminating a noncommercial service in Phoenix by approving the swap is no big deal – clearly reveals that even NBC Telemundo and CTE acknowledge the true impact of the swap. The elephant in the room that the *Joint Comments* are unable to hide is that the swap is not about a technical change to these stations’ output frequency, but a fundamental elimination of existing broadcast service.

While the import of NBC Telemundo and CTE making this argument is monumental in undercutting their claim to improved broadcast service through the swap, the argument itself – that the Commission already implicitly condoned the deletion of reserved noncommercial Channel 39 at Phoenix¹⁷ – is flat wrong. The *Joint Comments* assert that “because the Commission was prepared to eliminate the reserved Phoenix allotment entirely as part of the digital transition, it is impossible to conclude now that the reserved status of that channel is somehow sacrosanct”¹⁸ However, the Commission’s willingness to eliminate *vacant allotments* is irrelevant to the question of whether it should destroy a living, breathing

¹⁶ *Id.* at 6.

¹⁷ *Joint Comments* at 16-18.

¹⁸ *Joint Comments* at 7.

noncommercial station that is providing service to the Phoenix public. It is noteworthy in this regard that the Commission has *not* proposed eliminating a single noncommercial *station* to make way for DTV, and the attempt in the *Joint Comments* to blur the rather bright-line distinction between a vacant allotment and an operating station is absolutely unavailing.

Beyond this bright-line distinction, the assertion in the *Joint Comments* that the Commission should feel comfortable deleting the Phoenix noncommercial allotment because it is already deleting vacant noncommercial allotments around the state of Arizona mischaracterizes the Commission's actions. Rather than deleting these vacant noncommercial allotments for good, the Commission indicated that it intends to preserve as many of these allotments as possible in the DTV transition, stating that:

With regard to noncommercial vacant allotments, the DTV Table replaces existing vacant noncommercial NTSC allotments with new noncommercial reserved DTV allotments where feasible, in a manner similar to the approach suggested by the Joint Broadcasters. After the transition, we also will consider establishing additional noncommercial reserved allotments on recovered spectrum for those existing vacant noncommercial allotments that cannot be replaced at this time.¹⁹

This temporary and technically compelled deletion of vacant allotments stands in stark contrast to the permanent and unnecessary deletion of an operating station, and the *Joint Comments'* implicit acknowledgement that it is the deletion of an operating noncommercial station which is really at stake here speaks volumes about the claimed public interest "benefits" of the swap.

¹⁹ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14639 (1997).

III. THE PROPOSED SWAP IS CONTRARY TO THE PUBLIC INTEREST AND THE *JOINT COMMENTS* PROVIDE NO BASIS FOR ELIMINATING A NONCOMMERCIAL SERVICE IN PHOENIX

In attempting to defend the fact that its proposal would reduce the Phoenix area to only a single remaining noncommercial reserved allotment, the *Joint Comments* state that “[f]ully half of the 10 largest cities in the nation have a single noncommercial allotment, and four of these five have a UHF station as their sole noncommercial allotment”²⁰ The *Joint Comments* then proceed to abandon any connection with reality by claiming that after the swap, Phoenix would “continue to have access to noncommercial service that is equal to or better than” five of the ten largest cities in the country, including New York and Philadelphia.²¹ While these cities may in fact have a single noncommercial reserved channel allocated to *the specific community itself*, each has numerous stations operating on noncommercial channels in nearby communities which provide service to these large cities, entirely unlike the situation in Phoenix.²²

For example, the residents of New York City, which the *Joint Comments* state has only one noncommercial allotment,²³ actually receive broadcast service from no less than *six* stations operating on noncommercial channels. Thus, Phoenix residents would *not* “have access to noncommercial service that is equal to or better than” other large cities; they would have markedly worse noncommercial service. Eliminating one of the only two stations operating on a noncommercial channel serving Phoenix is therefore not the routine matter portrayed in the *Joint*

²⁰ *Joint Comments* at 18-19.

²¹ *Joint Comments* at 19.

²² There are at least six stations on noncommercial channels providing service to the city of New York (WNET, WLIW, WNYE-TV, WNJN, WNJB, and WFME-TV), and at least five stations on noncommercial channels providing service to the city of Philadelphia (WHYY-TV, WNJS, WYBE, WLVT-TV, and WNJT).

²³ *Joint Comments* at 19.

Comments, nor, as is discussed below, is there any public interest basis for inflicting this harm upon the residents of Phoenix.

A. NBC Telemundo Is Already Equipped to Compete Effectively in the Phoenix Market and Has Failed to Demonstrate How Depriving Phoenix Viewers of a Noncommercial Service Will Improve Its Competitive Position

As detailed in Univision's Comments,²⁴ KDRX-CA, the Telemundo affiliate serving the city of Phoenix, provides a Grade B signal, a Grade A signal, and a City Grade Signal that is almost exactly equivalent in population coverage to the same respective contours of Univision station KTVW-TV, and CTE's KDTP, the noncommercial station whose channel NBC Telemundo covets. Moreover, NBC Telemundo's KDRX-CA also has equivalent cable carriage to the Phoenix full power stations, testifying to NBC Telemundo's clout in the market and eliminating any argument that KDRX-CA is at a competitive disadvantage against full power stations, or that obtaining a full power station would yield any significant benefits with regard to the public's ability to access Telemundo programming. Of course, even if some marginal competitive benefit could be shown, it would hardly justify the termination of a noncommercial service to over three million people.

Recognizing this serious obstacle to its quixotic quest for a full power station, NBC Telemundo seeks to downplay these facts, claiming that the signal strength contours used for many decades by the Commission to determine whether a television signal is viewable, including the gold standard of signal strength contours – the 80 dBu City Grade contour²⁵ – are suddenly

²⁴ *Univision Comments* at 17-21 and Exhibit 1.

²⁵ *See CBS Television Network Affiliates Ass'n v. FCC*, 555 F.2d 985, 988 n.5 (1977) ("A 'city grade signal,' the most intense under the Commission's rules, provides a clear signal to the entire community to which the station is licensed.").

inadequate here.²⁶ Thus, while NBC Telemundo is forced to admit that by any standard ever used by the Commission, KDRX-CA's over-the-air signal reaches approximately the same number of viewers as the full power stations in the market,²⁷ it then attempts to construct a coverage disparity by crafting a results-oriented signal strength requirement of 101.5 dBu, a signal level so high as to practically permit reception of Telemundo programming on a viewer's dental fillings. Only by suggesting such an extreme standard is NBC Telemundo able to draw *any* distinction between the signal coverage of KDRX-CA and that of full power stations in Phoenix.

As to cable carriage, NBC Telemundo attempts to divert attention from KDRX-CA's universal cable carriage in Phoenix by erroneously claiming that KDRX-CA is only carried on the Enhanced Basic tier (and then complaining extensively about the added expense of Enhanced Basic service),²⁸ while Univision's KTVW is carried on the Basic tier. In fact, on two of the three cable systems in Phoenix (Qwest and CableAmerica), KDRX-CA is carried on the Basic tier, and in both cases on a channel *adjacent* to KTVW!²⁹ With regard to the third system, Cox Cable, it is Univision's understanding that *approximately 90% of all Cox subscribers receive Enhanced Basic service*, and therefore receive KDRX-CA. Moreover, since the *Joint Comments* themselves state that approximately one-third of Phoenix households are Hispanic, less than half of these Hispanic households are Spanish-dominant, and less than one-third of these Spanish-dominant households subscribe to cable,³⁰ the very small percentage of Cox subscribers that do

²⁶ *Joint Comments* at 45-47.

²⁷ *See Joint Comments* at Exhibit 2, at 5.

²⁸ *Joint Comments* at 43.

²⁹ *Univision Comments* at Exhibit 2.

³⁰ *Joint Comments* at 3.

not subscribe to Enhanced Basic service is unlikely to contain many of the Spanish-language viewers that NBC Telemundo claims KDRX-CA cannot reach.

Moving beyond NBC Telemundo's efforts to downplay the incontrovertible fact that KDRX-CA is on equal competitive footing with Univision's KTVW and other Phoenix full power stations, the proof can be found in its own telephone survey, attached to the *Joint Comments* as Exhibit 1. On the chart titled "Local Channel Reception Quality by Source of Local Programming," the Spanish-dominant respondents "were asked to state whether they usually receive better reception on Channel 33 [Univision's KTVW] or Channel 48 [Telemundo's KDRX-CA]." Despite NBC Telemundo's claims of KDRX-CA's gross inferiority, of the "TOTAL SAMPLE" of Spanish-dominant households responding, 46% indicated that KDRX-CA's reception quality was equal *or superior to* KTVW's reception quality.³¹ In other words, the ratio of respondents who thought KTVW's reception was better in comparison to those who thought reception of the two stations was the same (or that KDRX-CA's reception was in fact better) is only **1.3 to 1**³² – hardly the gross reception disparity claimed in the *Joint Comments*.³³

³¹ *Joint Comments* at Exhibit 1.

³² Even this figure, however, exaggerates the difference in *reception* quality, as it appears survey respondents confused program/picture quality with reception quality. According to this particular chart, 42% of *cable viewers* said they preferred "reception" of KTVW's signal over KDRX-CA's signal, even though "reception" over cable is obviously 100% for both stations. Whether this demonstrates a bias in the study to find a reception disparity where none exists, or is merely the result of survey respondents not understanding the question, it is all too apparent that the survey provides no useful information about the ability of viewers to *receive* KDRX-CA's signal, and therefore provides no support for giving NBC Telemundo a full power station to overcome these "purported but unsupported" reception difficulties.

³³ Thus, the summary in this chart stating that "[f]or the total sample, reported reception is better on Channel 33 [KTVW] by an 11 to 1 ratio" is flatly false, as it ignores entirely the 41% of respondents who said that reception of the two stations is identical. Using this same statistical distortion, if fifteen people said KTVW provided better reception, one person said KDRX-CA

Footnote continued.

Given the other claims in the *Joint Comments*, this is an amazing result. While NBC Telemundo ignores this overall result in favor of complaining that those who use only an indoor antenna are more likely to prefer KTVW's signal, advertisers purchase advertising based on a station's overall ability to reach viewers, and not on its ability to reach only those viewers using any particular reception technology. Since the reception quality of KDRX-CA and KTVW appear to be roughly equivalent among all Spanish-dominant viewers, particularly given the 4-5% margin of error cited in the survey, it is clearly not KDRX-CA's technical facilities limiting its ability to compete.³⁴ Thus, replacing those technical facilities with KDTP's largely equivalent full power facilities will serve no purpose other than to terminate KDTP's noncommercial service in Phoenix.

provided better reception, and 84 people said reception was identical, the *Joint Comments* would summarize this result as "respondents indicated reception of KTVW is better by a 15 to 1 ratio," when in fact, only 15% of respondents said reception of KTVW is better. Using this same distortion, this chart from the *Joint Comments* also falsely states that "[a]mong those using antennas for local reception, the disparity is much greater, with Channel 33 [KTVW] being reported stronger by more than a 20 to 1 ratio." *Joint Comments* at Exhibit 1 (emphasis added). However, the actual ratio of respondents who found KTVW's reception better compared to those who said reception was identical (or that KDRX-CA's reception was better) is only **1.7 to 1** for outdoor antennas and **2.7 to 1** for indoor antennas.

³⁴ While it could be suggested that showing advertisers KDRX-CA's population coverage maps and its universal cable carriage would be a better strategy for attracting advertising than getting thirty-four advertisers to affirm under penalty of perjury that KDRX-CA is an inferior station on which they would prefer not to advertise (see *Joint Comments* at 40 and Exhibit 3), the very fact that NBC Telemundo could collect such declarations is a pretty clear indication of its extensive influence with advertisers. Indeed, other than confirming the fact that the proposed swap is merely a business strategy of NBC Telemundo aimed at increasing its ad revenues and the value of its stations in the market, it is unclear what purpose the repetitive declarations serve. The Commission has held that its "duty as an agency runs to consumers, not advertisers." 2002 *Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definitions of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13642 (2003) (subsequent history omitted).

B. Even If the *Joint Comments*' Argument That Terminating Noncommercial Service to Over Three Million People Can Be Justified by a Claimed Improvement in Commercial Broadcast Service, the Number of Commercial Broadcast "Beneficiaries" Is Miniscule

In this proceeding, the Commission seeks to determine if the public interest would be better served by preserving the existing noncommercial service in Phoenix, or by relocating noncommercial station KDTP to a distant corner of the DMA to clear the way to award NBC Telemundo a full power commercial station in downtown Phoenix. While it is fairly obvious that the harm from the proposed channel swap is that it will deprive over three million Phoenix residents of half of their noncommercial stations,³⁵ quantifying any countervailing benefit is difficult, largely because it is so small. However, taking all of NBC Telemundo's claimed benefits at face value, it is possible to at least calculate a "best case scenario" as to the extent of the claimed public benefit. It is a best case scenario because it ignores the fact that being a "Spanish-dominant household" merely means that the family speaks Spanish at home more often than not (perhaps to be polite to an older relative in the household or for any other reason), not that the household members do not understand English or do not watch English language programming.³⁶

³⁵ While the *Joint Comments* (at 11) assert that commercial Phoenix television station KPAZ-TV operates in a noncommercial manner, there is no evidence in this proceeding that KPAZ-TV's operations would meet the operating requirements of a noncommercial licensee, or even if they did, that the station would not change to a commercial format at a later date. Similarly, should NBC Telemundo be given a full power station in Phoenix on the ostensible grounds of improving competition in a fictitious "Spanish-language" market, there is nothing to prevent it from converting that station to a far more valuable NBC-affiliated station at a later date.

³⁶ As discussed in Univision's Comments (at 22-23), even viewers that are exclusively Spanish speakers still watch English-language programming, so the underlying premise of NBC Telemundo's claimed benefit of creating competition for such viewers is fundamentally flawed. English-language stations already seek to attract all Hispanic viewers, including Spanish

Footnote continued.

Nonetheless, the benefit claimed by NBC Telemundo is an additional full power commercial source of Spanish-language programming for those Spanish-dominant households in Phoenix that are currently unable to view KDRX-CA. Utilizing the statistics presented in the *Joint Comments* along with other publicly available data, this is a fairly straightforward, if optimistic, calculation. To determine the approximate number of viewers that would benefit from replacing the facilities of KDRX-CA with those of KDTP, the formula is: the population residing within the KDTP Grade B contour (3,217,769),³⁷ minus the population residing in the KDRX-CA Grade B contour (3,105,109),³⁸ times the percentage of Hispanics households in the Phoenix DMA (18.4%),³⁹ times the percentage of such households that predominantly (more than 50% of the time) speak Spanish at home (45.4%),⁴⁰ times the percentage of such households that rely exclusively on over-the-air signals (46%),⁴¹ times the sum of the percentage of Spanish-dominant viewers who say they already occasionally, often, or frequently watch KDRX-CA (62%) and the product of the percentage of those who say they seldom or never watch KDRX-CA (38%) times the percentage of such viewers who indicate that this is due to reception problems (42%).⁴² In other words, the number of over-the-air Spanish-dominant viewers that

speakers, as is evidenced by the increasing prevalence of Spanish SAP channels on English-language programming, and the new trend of airing Spanish-language ads on English-language stations.

³⁷ *Univision Comments* at Exhibit 1.

³⁸ *Id.*

³⁹ *Joint Comments* at 3; see also <http://www.nielsenmedia.com/ethnicmeasure/hispanic-american/localmarkets.html> (visited Dec. 10, 2004).

⁴⁰ *Joint Comments* at 3.

⁴¹ *Joint Comments* at 37.

⁴² The information included in this calculation comes from the *Joint Comments*, Exhibit 1, “Frequency of Watching Local Spanish-Language Stations” and “Reasons for Not Watching Channel 48 More Often.”

are reached by KDTP's signal but not by KDRX-CA's signal who would actually watch KDRX-CA's programming on KDTP. The calculation is therefore: $(3,217,769 - 3,102,109) \times .184 \times .454 \times .46 \times (.62 + (.38 \times .42)) = 3377$. Thus, the result of this calculation reveals that a grand total of 3377 people in the Phoenix area will actually receive the claimed benefit from the proposed channel swap. Unfortunately, this represents only **0.1%** of the 3,217,769 viewers who will lose access to KDTP's noncommercial programming if the swap is approved – hardly the resounding public interest benefit claimed.⁴³

C. The *Joint Comments*' Premise That Television Markets Are Divided Into English-Language Markets and Spanish-Language Markets Is Erroneous and Contrary to Commission Precedent

As discussed above, even giving NBC Telemundo the benefit of the doubt that it is beneficial to the public to have a second full-power Spanish-language station in Phoenix itself, the number of viewers that will benefit is miniscule, particularly compared to the number of

⁴³ Even if the Commission were to accept the contention in the *Joint Comments* that, despite the similarity of the City Grade, Grade A, and Grade B contours of KDRX-CA and the full power stations in the market, it is the newly invented 101.5 dBu contour that really matters, the actual "benefit" to viewers is still marginal. Making the less than sound assumption that utilizing KDTP's facilities would eliminate all of KDRX-CA's reception problems, the benefit formula using the available data would be: total Hispanic population within KDTP's 101.5 dBu contour (700,700), minus the total Hispanic population within KDRX-CA's 101.5 dBu contour (348,000), times the percentage of Hispanic households that predominantly (more than 50% of the time) speak Spanish at home (45.4%), times the percentage that rely exclusively on over-the-air signals (46%), times the sum of the percentage of Spanish-dominant viewers who say they already occasionally, often, or frequently watch KDRX-CA (62%) and the product of the percentage of those who say they seldom or never watch KDRX-CA (38%) times the percentage of such viewers who indicate that this is due to reception problems (42%). The calculation is therefore: $(700,700 - 348,000) \times .454 \times .46 \times (.62 + (.38 \times .42)) = 57,453$. The information included in this calculation comes from the *Joint Comments* at [Exhibit 1](#) and [Exhibit 2](#). The result of even this wildly magnanimous calculation is that 57,453 viewers would benefit from NBC Telemundo's theoretically improved service, representing only 1.79% of the viewers that will lose all access to KDTP's noncommercial programming if the channel swap is permitted. While the proponents of the swap are free to quibble over the precise number of viewers that might benefit from the proposed swap, it is clear that any benefit, no matter how calculated, is many orders of magnitude less than the harm such a swap would impose upon the public.

viewers that would be harmed by the swap. However, there is actually no reason to give NBC Telemundo the benefit of that doubt, as the Commission has in fact left no doubt in its prior rulings that Spanish-language and English-language stations do not compete in separate markets. As a result, what NBC Telemundo is actually seeking to do through the swap is not, as it claims, create a competitive full power Spanish-language market in Phoenix,⁴⁴ but merely to add a 12th full power commercial station serving Phoenix.

The entire premise of the proposed channel swap rests on the erroneous insistence that broadcast stations are either part of an English-language market or a Spanish-language market, and one does not compete for viewers or advertisers against the other. Stubbornly ignoring the Commission's direct rulings that no such separate competitive markets exist, the *Joint Comments* cobble together sundry Commission decisions that distinguish Spanish-language stations for regulatory purposes wholly unrelated to competitive markets.⁴⁵ Ultimately, the *Joint Comments'* lengthy dissertation on the regulatory history of foreign-language stations is completely irrelevant, as the Commission has already provided a clear answer to the question NBC Telemundo poses, which is that Spanish-language stations do not constitute a separate market. Thus, NBC Telemundo's statement that "[t]here is much evidence that the Spanish-language television market should be viewed as a distinct market for Commission purposes"⁴⁶ ignores the

⁴⁴ Even if there actually were a separate Spanish-language market in Phoenix, Univision's Comments (at 22-24), as well as those of CoxCom, Inc. (at 2-3) and Council Tree Communications, Inc. (at 7-8) demonstrate that there are plenty of Spanish-language competitors serving Phoenix both over-the-air and on cable, eliminating any significant public benefit from the slight increase in signal coverage of one particular competitor that is proposed here.

⁴⁵ *Joint Comments* at 29-36.

⁴⁶ *Joint Comments* at 35.

Commission's actual conclusion on the matter.⁴⁷ NBC Telemundo is certainly well aware of this precedent, as it participated in the very proceeding in which this issue was most recently addressed.⁴⁸

Of course, one of the reasons cited by the Commission in reaching its conclusion that all local television stations compete in a single market is that program formats are not permanent,⁴⁹ and today's English-language station can be tomorrow's Spanish-language station. Perhaps more relevant to the Commission's decision here is the corollary to that statement – namely, that today's Spanish-language station can become tomorrow's English-language station. Given how easy it is to change a station's program format, particularly for an entity with the vast program library of NBC Telemundo, once the proposed swap is completed on the pretense of creating a full power Spanish-language competitor, there is nothing to prevent the station's conversion to an NBC affiliate in Phoenix, making it far more valuable than a Telemundo affiliate, and providing a windfall to NBC far beyond the windfall it is already seeking through the swap. NBC currently does not own the NBC network affiliate in Phoenix, and given the current values of stations with a big four network affiliation in a top twenty market,⁵⁰ it would hardly be in

⁴⁷ See *Univision Comments* at 23 (discussing *Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834, 18855-56 (2003)); see also *Spanish Radio Network*, 10 FCC Rcd 9954, 9956 (1995).

⁴⁸ See *Letter from F. William LeBeau to Ms. Marlene Dortch*, MM Docket MB 02-235 (Aug. 21, 2003).

⁴⁹ *Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834, 18855-57 (2003).

⁵⁰ See, e.g., *Viacom to Acquire Sinclair's KOVR*, BROADCASTING & CABLE, Dec. 6, 2004 at 6 (reporting that Viacom Inc. is buying KOVR(TV), the CBS affiliate in Sacramento, California for \$285 million in cash). According to Nielsen Media Research, the Sacramento-Stockton-Modesto, California market is the 19th largest television market in the country and the Phoenix, Arizona market is the 15th largest, making the station here even more valuable as a big four network affiliate. See BIAFN 2004 TELEVISION YEARBOOK (2004).

NBC Telemundo shareholders' interest to maintain such a station as merely a Telemundo affiliate. Either way, however, viewers in Phoenix lose a noncommercial station merely to augment NBC Telemundo's already substantial revenues.

D. Phoenix Residents Are Well-Served by Both Full and Low Power Stations Carrying Spanish and English-Language Programming

As detailed in Univision's Comments and noted by the Commission's *NPRM*, the Hispanic community in Phoenix is well-served by both full and low power stations carrying Spanish and English-language programming. Eleven commercial full power television stations and thirteen low power and Class A television stations, including eight Spanish-language stations (one of which also broadcasts some English-language programming)⁵¹ compete for advertisers and viewers in Phoenix, in addition to the numerous cable and satellite programming channels available in both English and Spanish. What Phoenix lacks, however, is a sufficient number of noncommercial stations. Currently, there are but two noncommercial reserved allotments serving Phoenix, and NBC Telemundo's proposal would exacerbate this shortage by removing one of those two reserved noncommercial allotments.

Setting aside the fact that the proposed swap would not just adversely affect the balance of commercial and noncommercial stations serving Phoenix, but would disrupt existing service, if the Commission were making allocations for the Phoenix area from scratch today, it is

⁵¹ These stations include KTVW(TV), KDRX-CA, KFPH-CA, KPDF-CA, KCOS-LP, KPHZ-LP, K43GV, and K53GF. Univision notes that the number of Phoenix stations is even higher than that presented in its Comments, as a subsequent review of the Commission's CDBS database indicates that there are five Class A and eight low power stations licensed just to Phoenix itself. To the extent there may be yet more stations licensed to nearby communities, the actual number of broadcast stations serving the Phoenix area could be higher still.

unimaginable that it would find that the public interest would be better served by a ninth Spanish-language signal than a second noncommercial station.⁵²

Despite this fact, the *Joint Comments* state the opposite, arguing that “the Phoenix DMA is well-served by noncommercial stations,”⁵³ but is underserved by Spanish-language programming.⁵⁴ Ignoring entirely the significant number of Spanish-language over-the-air signals serving Phoenix, NBC Telemundo states that Phoenix is currently a “television gray area for Spanish-language services”⁵⁵ because it receives only one full power Spanish-language station over-the-air. This distorted use of the Commission’s allotment criteria has no basis in Commission caselaw, and carries no more weight than noting that New York City is a white area for stations with Country & Western programming. In neither case is there any basis to disrupt existing broadcast service to cure such format “shortages.”

⁵² Perhaps recognizing that there is no programming benefit to the residents of Phoenix from merely moving Telemundo programming from KDRX-CA’s facilities to the KDTP full power facilities, NBC Telemundo seeks to offer the Commission a carrot by stating that:

If the Commission grants the Proposal, however, Telemundo is confident that these advertisers will support its full-power station in Phoenix. Accordingly, to demonstrate its commitment to the Hispanic audience in Phoenix, NBC Telemundo has pledged to broadcast a minimum of one hour of locally produced news each day Monday through Friday promptly upon commencing operations on Channel 39 in Phoenix.

Joint Comments at 40. However, in order to offer this carrot to the Commission, NBC Telemundo must first take it away from the residents of Phoenix, as KDRX-CA *already airs* an hour of local news programming Monday through Friday. See <http://www.tvguide.com/listings/> (last visited Dec. 14, 2004). Thus, this “benefit” from giving NBC Telemundo a full power station in Phoenix, like the other public benefits claimed, is entirely illusory.

⁵³ *Joint Comments* at 22.

⁵⁴ *Joint Comments* at 23-24.

⁵⁵ *Joint Comments* at 4.

The *Joint Comments* also overlook the glaringly obvious fact that, even accepting their contorted use of the Commission's allotment criteria, the elimination of the claimed Spanish-language gray area requires the creation of a noncommercial gray area for a far larger number of Phoenix viewers – a trade that the Commission would never permit in an allotment proceeding, even if it did not involve the disruption in existing service required here.

It is also worth noting that the Commission has already ruled that Hispanic viewers in the city of Phoenix are well-served, even at a time when there were fewer Spanish-language broadcast stations in Phoenix than exist today. In 2001, Flagstaff station KFPH-TV, which carries Spanish-language programming and is located in the Phoenix DMA, sought carriage pursuant to its must-carry rights on the Cox cable system in Phoenix. In response to an effort to enforce those rights at the FCC, Cox filed a market modification request arguing that Flagstaff (which is significantly closer to Phoenix than Holbrook)⁵⁶ was too distant and did not offer programming sufficiently needed by Phoenix residents to be considered part of the Phoenix market for cable carriage purposes.

Despite a showing that KFPH-TV carried four hours per week of news and public affairs programming produced *in* Phoenix focusing *on* Phoenix issues and broadcast throughout Phoenix on sister station KFPH-CA, the Commission ruled that Flagstaff station KFPH-TV did not merit cable carriage in Phoenix and modified the station's market to exclude Phoenix for

⁵⁶ Given the Commission's decision in *CoxCom, Inc., Petition for Modification of the DMA Market of Television Broadcast Station KFPH(TV), Flagstaff, Arizona*, 17 FCC Rcd 17192 (MB 2002) that despite the station's Phoenix programming, a Flagstaff station was too distant to be considered part of the Phoenix market, the suggestion that Holbrook – which is much farther from Phoenix than Flagstaff – serves the same market as Phoenix and is therefore eligible for a commercial/noncommercial channel swap is obviously incorrect.

cable carriage purposes.⁵⁷ In response to Univision’s argument that Cox (at that time) carried only two local Spanish-language stations (KTVW and Telemundo station KDRX-CA) and that Cox subscribers would benefit from the additional source of local Spanish-language programming, which was already available to over-the-air viewers, the Commission held that:

Cox states that it carries thirteen Phoenix-area television stations that serve the Cox communities with 179.5 hours per week of local programming, including local news, sports, and public affairs programming. Univision contends that the Hispanic viewers in the Cox communities have very limited sources of Spanish language programming from which to choose. In reply, Cox points out that two of the thirteen broadcast stations carried in the Cox communities provide exclusive Spanish language programming, including daily, locally produced Spanish language newscasts each weekday evening. From the above, it is apparent that Cox transmits an abundance of local broadcast programming, including two Spanish language stations. Thus, the third factor weighs in favor of market modification.⁵⁸

Thus, even though Cox carried only two of the Spanish-language broadcast stations available in Phoenix, and the addition of a third would have required only the enforcement of existing must-carry laws (as opposed to the upending of existing laws that the proposed channel swap here would involve), the Commission had no trouble finding that the combination of English and Spanish-language stations carried by Cox made it “apparent that Cox transmits an abundance of local broadcast programming”⁵⁹ This ruling entirely undercuts the rationale of the proposed channel swap in multiple ways. First, the Commission made clear *once again* that English language and Spanish language stations are not considered separately in determining whether the public is receiving adequate service, and that even if it did, two Spanish-language

⁵⁷ *CoxCom, Inc., Petition for Modification of the DMA Market of Television Broadcast Station KFPH(TV), Flagstaff, Arizona*, 17 FCC Rcd 17192 (MB 2002).

⁵⁸ *Id.* at 17196-97 (footnotes omitted).

⁵⁹ *Id.* at 17197.

broadcast stations – *even where one is a low power station carried only on the Enhanced Basic tier* – constitutes an “abundance” of local broadcast programming.

It is abundantly clear that marginally improving the over-the-air signal of one of eight local Spanish-language stations is far less compelling than the introduction to cable subscribers of a third local Spanish-language broadcast signal on their system. It is also clear that in the context of the Commission’s ruling, if ordering carriage of a new broadcast signal, which would have caused no harm to the public, was not justified by the benefit to the public, then the elimination of a noncommercial service to over three million viewers as the price of this swap is indefensible.

E. While NBC Telemundo Threatens to Terminate Broadcast Service in Holbrook and Thereby Create a “White Area” If the Commission Rejects the Proposed Swap, the *Joint Comments* Themselves Demonstrate That Holbrook Cannot Support a Noncommercial Station and the Proposed Swap Would Therefore Create the Very “White Area” That the Swap Is Supposed to Prevent

Shifting from the harm the proposed swap will cause in Phoenix to the harm it will cause in Holbrook, the proponents of the swap once against rely on internally inconsistent logic in an effort to construct a basis for the swap. Namely, while they claim that Holbrook station KPHZ, “which, having experienced four consecutive years of no revenues, is doomed to fail,”⁶⁰ they also state, with great optimism, that “[a]s an NCE facility, however, the station has a more promising outlook because it can be expected to draw on sources of funding independent of advertising revenues.”⁶¹

⁶⁰ *Joint Comments* at 5.

⁶¹ NBC Telemundo Phoenix, Inc., *Joint Petition to Amend the Television Table of Allotments*, (Aug. 7, 2003) at 21.

As detailed in Univision's Comments, NBC Telemundo's assertion that the proposed channel swap is the only way to preserve broadcast service in Holbrook is patently false, and ignores the fact that KPHZ's signal would cover over 2.7 million viewers, including many in the Phoenix area, if it would merely build out its existing DTV construction permit.⁶² Anticipating the inevitable claim by NBC Telemundo that terrain shielding would prevent coverage of this vast audience, Univision notes that through the Commission's recent approval of on-channel low power DTV facilities to fill in holes in DTV coverage, KPHZ will be able to achieve its predicted DTV contour and serve a large portion of the city of Phoenix regardless of any potential terrain issues.⁶³ Thus, Holbrook has no need of the swap to preserve broadcast service.

In contrast, it is impossible to see how changing the Holbrook allotment to a noncommercial allotment would improve its chances of survival, and it is fairly apparent from the *Joint Comments* themselves that the swap would greatly reduce the viability of broadcast service in Holbrook. Among the more incredible disconnects in the *Joint Comments* is the statement that:

Currently, Phoenix is the only community within its entire DMA that has an operational noncommercial station Following the expected deletion of the reserved allotments for Holbrook, Globe, Parker, Prescott, McNary, and Safford, and the possible deletion of the Flagstaff and Coolidge reserved allotments, the only reserved allotments in the entire Phoenix DMA will be in Phoenix, Kingman (which, as noted above, is in the northwestern part of Arizona), and Page – which itself appears to be headed for deletion. This means that for a huge geographical area in Arizona north of Phoenix and within the Phoenix DMA of approximately 58,000 square miles (an area larger than the state of Illinois), there are only six operating commercial stations and *no* operating noncommercial stations.⁶⁴

⁶² Univision Comments at 2.

⁶³ Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class S Television Stations, 19 FCC Rcd 19331 (2004) at ¶ 249 (authorizing operations that are technically equivalent to DTV boosters).

⁶⁴ Joint Comments at 21-22 (footnotes omitted).

While the *Joint Comments* attempt to make lemonade out of these lemons by stating that, because of this, “[i]mplementation of the Proposal also will diversify the distribution of stations operating on reserved channels within the Phoenix DMA,”⁶⁵ the far more obvious import of the statement above is that a noncommercial station in Holbrook has *no chance* of surviving, as no community in the vast region surrounding Holbrook has successfully supported a noncommercial station, including the much larger city of Flagstaff, *and Holbrook itself*.

The *Joint Comments* never come close to explaining how it is that a noncommercial television station could survive in Holbrook, when one of the largest corporations in the world claims it cannot sustain a station there. The *Joint Comments* amazingly dismiss the question of whether the community of Holbrook can support a noncommercial station as “a largely theoretical concern.”⁶⁶ However, it is not at all theoretical when the result of the proposed swap is to remove a noncommercial service from 3.2 million viewers in Phoenix and leave it to starve to death in a community of 4,917 people. Thus, while the *Joint Comments* state that “reality demonstrates that KPHZ cannot survive as a commercial outlet,”⁶⁷ they suggest without embarrassment that reality should apparently be of no concern to CTE. In fact, the best response the *Joint Comments* can muster when faced with the historical facts that no one has been able to make a go of a noncommercial station in Holbrook for thirty years and that KPHZ has never generated a dollar of revenue, is that “CTE should be given an opportunity to *try*” to make a

⁶⁵ *Joint Comments* at 20-21.

⁶⁶ *Joint Comments* at 27.

⁶⁷ *Joint Comments* at 25.

station work in Holbrook.⁶⁸ To say that this is a weak public interest showing is an understatement.

Finally, while the *Joint Comments* utilize the creative euphemism that the proposed swap will “geographically diversify” noncommercial service in Arizona, moving a noncommercial station from the *only* city in the entire DMA that has been able to successfully support a noncommercial station is a fairly predictable disaster in the making. While such a move might geographically diversify the remaining noncommercial *allotments*, it will do nothing to geographically diversify noncommercial *service*, as the failure rate of noncommercial stations in the Phoenix DMA outside of Phoenix itself is 100%. A failed noncommercial station in Holbrook is of no more use to its residents than the noncommercial allotment that sat fallow in that community for over thirty years. However, at least the existing Holbrook noncommercial allotment did not come at the expense of noncommercial service in Phoenix. The channel swap proposed here is not nearly as benign.

F. Having Bought a Station with No Revenue, NBC Telemundo Now Threatens the Commission With the Creation of a White Area in Holbrook If Its Demands for a Full Power Station in Phoenix Are Not Met

At its core, NBC Telemundo’s proposal is a not-so-subtle attempt to bully the Commission into swapping its recently purchased Holbrook full power station for a Phoenix full power station, at the expense of Phoenix-area viewers. NBC Telemundo repeatedly threatens that if the Commission does not approve the proposed swap, it will be forced to shut off KPHZ,

⁶⁸ *Joint Comments* at 27 (emphasis added).

resulting in the creation of a new “white area” in Holbrook.⁶⁹ Shutting off KPHZ, however, is wholly within NBC Telemundo’s control, and the situation today is no different than when NBC Telemundo bought the station, along with the two low power stations that presumably are generating revenue, for \$7.5 million dollars barely two years ago. NBC Telemundo’s bold threat has little to do with serving the public interest, and everything to do with trying to leverage its investment into something far more valuable.

In fact, given the great opportunity that KPHZ’s currently authorized DTV contour presents, if the Commission is genuinely concerned that KPHZ will be shut down, **Univision hereby states its willingness to operate KPHZ and preserve broadcast service in Holbrook should NBC Telemundo decide to shut the station down and surrender its license.**⁷⁰

Univision’s willingness, and perhaps the willingness of others, to operate KPHZ should obviate the Commission’s concern that NBC Telemundo will create a white area in Holbrook, and should allow the Commission to focus on the public interest benefits of the proposal, or more precisely the lack thereof, instead of on NBC Telemundo’s threats to terminate service.

G. Beyond the Lack of a Public Interest Basis for the Swap, the Proposed Parties to the Swap Have Failed to Meet the Procedural Requirements for a Channel Swap

As discussed in Univision’s Comments, the fundamental public interest premise for a commercial/noncommercial channel swap is to improve the noncommercial station’s ability to

⁶⁹ *Joint Comments* at 9 (“In the absence of the channel exchange proposed herein, it is virtually certain that KPHZ will fail as a commercial outlet and will go dark, thereby creating a white area . . .”).

⁷⁰ Given the current state of flux of the Commission’s multiple ownership rules, it is difficult to predict whether a satellite waiver might be necessary for Univision’s operation of KPHZ. However, as the *Joint Comments* make clear that KPHZ is currently a failing station with no revenues and no viewers that would otherwise be shut down, it would appear to be an ideal candidate for a satellite waiver.

serve its audience.⁷¹ While that improvement in service cannot occur here, as none of KDTP's existing audience will be able to view its signal if it is moved to Holbrook, it should at least improve the service provided by KDTP to whatever audience will be able to receive its signal. In this regard, the only benefit the *Joint Comments* cite is the payment to CTE of an undisclosed amount for its participation in the swap.⁷² However, the *Joint Comments* fail to discuss the amount of money that will be given to CTE for its channel, or how that money will be used to improve the noncommercial station's broadcast service.

In the *Intraband Order*, the Commission determined that the "use of proceeds by noncommercial television stations participating in channel exchanges under the proposed rule should be limited to purposes related to the operations of the noncommercial licensee. . . . [I]t would be self-defeating if the funds obtained were to be used for other, non-broadcast purposes."⁷³ There is no reason why this policy would not also apply to channel swaps that fall outside the bounds of those permitted under Section 1.420(h) (assuming such swaps can be permitted at all).

Applicants "must offer assurances that any consideration resulting from the exchange will be devoted exclusively to activities related to the operation of the noncommercial

⁷¹ *Univision Comments* at 6-8.

⁷² *Joint Comments* at 27.

⁷³ *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 Rad. Reg. 2d (P&F) 1455 (1986) at ¶ 31 ("Intraband Order"). The Commission has consistently required applicants to make this showing. *See, e.g., Amendment of Section 73.606(b), Table of Allotments, Digital Television Broadcast Stations (Buffalo, New York)*, 16 FCC Rcd 4013, 4014 (2000); *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida)*, 5 FCC Rcd 6566, 6568 (1990).

educational television station,”⁷⁴ something that NBC Telemundo and CTE have not done in the present case. Indeed, aside from an oblique reference to the fact that noncommercial stations have to transition to DTV and that transition will cost money, the *Joint Comments* are devoid of any discussion of how the funds will improve the station or even if all of the funds will indeed be used to improve the station.⁷⁵ Thus, the failure of the parties to the proposed swap to provide precise information with respect to the financial terms of the proposed transaction, or the manner in which the proceeds of the transaction will be used, prevents the Commission from even considering the merits of the swap itself.

IV. IN THE EVENT THAT THE COMMISSION DECIDES TO APPROVE THE CHANNEL SWAP PROPOSAL, CHANNEL 39 AT PHOENIX MUST BE OPENED TO COMPETING APPLICANTS

Should the Commission decide to de-reserve Channel 39 notwithstanding the harm that would accrue to the public, it must permit other parties to apply for the allotment. In the *NPRM*, the Commission noted that its order adopting the Television Table of Allotments indicated that noncommercial educational stations operating on reserved channels that sought to operate commercially would have to file an application for a new license in competition with any others seeking the channel.⁷⁶ The *NPRM* goes on to state that despite this “uncodified rule,” the Commission “may, in a rulemaking proceeding, limit potential applicants’ ability to apply for the

⁷⁴ *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Boca Raton and Lake Worth, Florida)*, 8 FCC Rcd 6189, 6189 (AB 1993).

⁷⁵ In this regard, it is odd that NBC Telemundo is apparently willing to provide funding to permit CTE to construct DTV facilities for Holbrook as part of the swap, but is unwilling to spend the money to build the DTV facilities for itself and thereby avoid any need for the swap in the first place.

⁷⁶ *NPRM* at ¶ 8 (citing *Amendment of Section 3.606 of the Commission’s Rules and Regulations; Amendment of the Commission’s Rules, Regulations, and Engineering Standards Concerning the Television Broadcast Service; Utilization of Frequencies in the Band 470 to 890 MCS. for Television Broadcasting*, Sixth Report and Order, 41 FCC 148, 212, n.51 (1952)).

channels if, in the Commission’s judgment, such action will promote the public interest, convenience and necessity,”⁷⁷ and the *NPRM* requests comment on whether the proposed channel swap warrants protection from competing applications.⁷⁸ Not surprisingly, the *Joint Comments* argue that the proposed swap should be afforded protection from competing applicants.

In particular, the *Joint Comments* argue that the policy of requiring competing applicants when a noncommercial channel is de-reserved may no longer be valid in light of the Commission’s *Intraband Order*.⁷⁹ The *Intraband Order*, however, simply identified a particular situation in which it is presumptively in the public interest to protect the proposed de-reservation of a noncommercial channel from competing applicants.⁸⁰ While the *Joint Comments* make much of the fact that the *Intraband Order* affords protection to those seeking swaps under 1.420(h), it seems to lose sight of the fact that the proposed channel swap at issue overwhelmingly fails to meet the requirements of 1.420(h), and thus, cannot avail itself of the protection afforded by that rule section. The Commission has expressly held that the *Intraband Order* “did not apply to interband exchanges of noncommercial for commercial television channels, and was expressly limited to intraband exchanges” and that “while certain of the policy rationales in the Report and Order may be applicable in the context of interband exchanges, the

⁷⁷ *NPRM* at ¶ 8 (citing *Storer Broadcasting v. FCC*, 351 U.S. 192 (1956) and *Malrite of New York, Inc.*, FCC 84-338, rel. July 31, 1984).

⁷⁸ *NPRM* at ¶ 8.

⁷⁹ *Joint Comments* at 48-50.

⁸⁰ *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 Rad. Reg. 2d (P&F) 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988).

Commission made no determination in the [Intraband Order] concerning the applicability of those rationales to interband exchanges.”⁸¹

More important here, however, is the fact that the protection from competing applications provided by the *Intraband Order* for intraband swaps *required* that the commercial and noncommercial stations serve “substantially the same area,” making the channel swap more akin to a technical change to existing facilities than to the introduction of an entirely new local service. Viewers would have access to the same stations as before, just on different channels. That is clearly not the case with the swap proposed here, which would create an entirely new commercial allotment for the Phoenix area and an entirely new noncommercial allotment for the Holbrook area, neither of which will provide an over-the-air signal to *any part* of its prior service area. While the *Joint Comments* seek to extend the *Intraband Order*’s logic for declining to accept competing applications, the key component of that logic – that only the channels change, not the fundamental service area – is factually missing from the swap proposed here. The swap proposed here presents a much different situation than that considered in the *Intraband Order*, and is far more akin to creating a new commercial allotment in Phoenix – a situation in which the Commission has consistently found it necessary to invite competing applications.

CONCLUSION

The channel swap proposed in this proceeding is a desperate creature. It has no basis in fact, law, policy, procedure, or logic, yet the *Joint Comments* blithely ignore all of this, and attempt to construct an alternate universe where such a proposal somehow makes sense. Unfortunately, broadcasters, the public, and the Commission must continue to reside in this

⁸¹ *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 3 FCC Rcd 2517 at ¶ 3 (1988) (emphasis added).

universe, where the innumerable flaws in the proposal are all too apparent. Whether judged from the lack of public benefit it will create, or from the immense harm to the public it will cause, the conclusion that the proposed swap is harmful to the public interest is unavoidable, and the swap should be promptly rejected so that the parties can focus on more productive avenues for improving broadcast service to the public.

Respectfully submitted,

UNIVISION COMMUNICATIONS INC.

By: /s/ Scott R. Flick

Scott R. Flick
Brendan Holland

Its Counsel

Shaw Pittman LLP
2300 N Street, NW
Washington, D.C. 20037
(202) 663-8000

Dated: December 14, 2004

CERTIFICATE OF SERVICE

I, Brendan Holland do hereby certify that a copy of the foregoing “**REPLY
COMMENTS OF UNIVISION COMMUNICATIONS INC.**” was mailed, first class, postage prepaid this 14th day of December 2004 to the following:

Barbara Kreisman*
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W., Room 2-A666
Washington, D.C. 20554

Joyce Bernstein*
Media Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A521
Washington, D.C. 20554

Margaret L. Tobey
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

F. William LeBeau
Senior Regulatory Counsel
NBC Telemundo License Co.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Richard E. Wiley, Esq.
John E. Fiorini, III, Esq.
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006

Robert L. Olender, Esq.
Koerner & Olender, PC
5809 Nicholson Lane, Suite 124
North Bethesda, MD 20852

/s/ *Brendan Holland*

Brendan Holland

*Via Electronic Mail